

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 7th day of March, two thousand eight.

PRESENT:

HON. WILFRED FEINBERG,
HON. JOSÉ A. CABRANES,
HON. SONIA SOTOMAYOR,
Circuit Judges.

JIAN LU XIE,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,¹
Respondent.

07-3054-ag
NAC

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

1 **FOR PETITIONER:** **Vlad Kuzmin, New York, New York.**

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3 **FOR RESPONDENT:** **Jeffrey S. Bucholtz, Acting**
4 **Assistant Attorney General, Civil**
5 **Division; James E. Grimes, Senior**
6 **Litigation Counsel; Angela N. Liang,**
7 **Trial Attorney, Office of**
8 **Immigration Litigation, U.S.**
9 **Department of Justice, Washington,**
10 **D.C.**

11
12 UPON DUE CONSIDERATION of this petition for review of a
13 Board of Immigration Appeals ("BIA") decision, it is hereby
14 ORDERED, ADJUDGED, AND DECREED that the petition for review
15 is DENIED.

16 Petitioner Jian Lu Xie, a citizen of the People's
17 Republic of China, seeks review of a June 19, 2007 order of
18 the BIA affirming the November 29, 2005 decision of
19 Immigration Judge ("IJ") Sarah M. Burr denying Xie's
20 application for asylum, withholding of removal, and relief
21 under the Convention Against Torture ("CAT"). *In re Jian Lu*
22 *Xie*, No. A 97 957 972 (B.I.A. June 19, 2007), *aff'g* No. A 97
23 957 972 (Immig. Ct. N.Y. City Nov. 29, 2005). We assume the
24 parties' familiarity with the underlying facts and
25 procedural history in this case.

26 We review the decision of the IJ as supplemented by
27 the BIA. *See Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d
28 Cir. 2005). The agency's "findings of fact are conclusive
29 unless any reasonable adjudicator would be compelled to

1 conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

2 We find that the agency's adverse credibility
3 determination was supported by substantial evidence. The IJ
4 reasonably found implausible that Xie: (1) became a Falun
5 Gong instructor within four months of having learned the
6 practice himself; (2) taught Falun Gong in a government
7 hospital, when he acknowledged that he knew that Falun Gong
8 had been outlawed by the Chinese government; and (3) taught
9 Falun Gong to students at the school where he worked, after
10 having been fired from his job at the hospital for the same
11 reason. These findings were proper where the IJ developed
12 the record such that the reasons for her incredulity were
13 apparent. *Siewe v. Gonzales*, 480 F.3d 160, 168-69 (2d Cir.
14 2007) (affirming when implausibility is "viewed in the light
15 of common sense and ordinary experience").

16 In addition, the IJ reasonably based her adverse
17 credibility determination on her finding that Xie's asylum
18 application and testimony were inconsistent regarding how he
19 came to be fired from his job at the hospital. He testified
20 that hospital officials discovered that he was teaching
21 Falun Gong in the hospital, but made no such assertion in
22 his asylum application. Because this inconsistency
23 concerned the central element of Xie's claim, it was plainly
24 "material to his claim of persecution," *Zhou Yun Zhang v.*

1 *INS*, 386 F.3d 66, 74 (2d Cir. 2004), overruled in part on
2 other grounds by *Shi Liang Lin v. U.S. Dep't of Justice*, 494
3 F.3d 296, 305 (2d Cir. 2007) (en banc), and substantial when
4 measured against the record as a whole, *Secaida-Rosales v.*
5 *INS*, 331 F.3d 297, 308-09 (2d Cir. 2003). Therefore, the IJ
6 properly relied on this inconsistency as a basis for her
7 adverse credibility determination. Although Xie was given
8 the opportunity to explain these inconsistencies and
9 implausibilities, the IJ reasonably rejected his
10 explanations. *Majidi v. Gonzales*, 430 F.3d 77, 80-81 (2d
11 Cir. 2005) (holding that the agency need not credit an
12 applicant's explanations for inconsistent testimony unless
13 those explanations would compel a reasonable fact-finder to
14 do so).

15 Lastly, the IJ did not err in finding that Xie's
16 failure to submit evidence corroborating his claim rendered
17 him unable to rehabilitate testimony that had already been
18 cast in doubt. See *Xiao Ji Chen v. U.S. Dep't of Justice*,
19 471 F.3d 315, 341 (2d Cir. 2006).

20 However, the IJ erred by basing her adverse credibility
21 determination on her finding that Xie's testimony about his
22 practice of Falun Gong was "lacking in detail" where she did
23 not ask him to provide additional details. See *Jin Chen v.*

1 *U.S. Dep't of Justice*, 426 F.3d 104, 114 (2d Cir. 2005)
2 (holding that the record did not support the agency's
3 adverse credibility finding in the absence of additional
4 probing).²

5 This error notwithstanding, remand would be futile
6 because, based on the properly made findings outlined above,
7 it can be "confidently predict[ed]" that the IJ would reach
8 the same decision on remand. *Xiao Ji Chen*, 471 F.3d at 339.
9 The IJ's adverse credibility determination was amply
10 supported by her findings of inconsistencies and
11 implausibilities that were material to Xie's claims, and his
12 failure to rehabilitate his testimony with corroborating
13 evidence. Accordingly, the IJ properly found that Xie
14 failed to meet the burden of proof required for asylum,
15 withholding of removal, and relief under the CAT, where each
16 of his claims was based upon the same factual predicate.
17 *See Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520,

² To the extent the IJ's finding can be read to question Xie's practice of Falun Gong by virtue of his lack of doctrinal knowledge, it was in error. *See Yose Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006) ("Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and that those same people can be persecuted for their religious affiliation.").

1 523 (2d Cir. 2005).

2 Xie further claims that the BIA violated his due
3 process rights by declining to review the "previously
4 unavailable" evidence he submitted in support of his appeal
5 to the BIA. Although Xie asserted in his appeal to the BIA
6 that "[i]n the alternative, this matter should be remanded
7 to proper adjudication of the newly available evidence," he
8 did not file a motion to remand as required by regulation.
9 See 8 C.F.R. § 1003.1(d)(3)(iv) (providing that a "party
10 asserting that the Board cannot properly resolve an appeal
11 without further factfinding must file a motion for remand").
12 Accordingly, the BIA did not violate Xie's due process
13 rights by declining to consider the new evidence he
14 submitted. See *Li Hua Lin v. U.S. Dep't of Justice*, 453
15 F.3d 99, 104 (2d Cir. 2006).

16 For the foregoing reasons, the petition for review is
17 DENIED. As we have completed our review, any stay of
18 removal that the Court previously granted in this petition
19 is VACATED, and any pending motion for a stay of removal in
20 this petition is DISMISSED as moot.

21 FOR THE COURT:
22 Catherine O'Hagan Wolfe, Clerk
23

24 By: _____
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